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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1182

NOELLE M. HENRY,

Petitioner,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COAHOMA COUNTY BOARD OF EDUCATION, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled cause on December 3, 1965, rehearing having been denied on January 4, 1966.

Citations to Opinions Below

The opinion of the District Court is set forth at R. 198, and reported at 246 F. Supp. 517.[1] The opinion of the Court of Appeals, printed in Appendix B, *infra*, p. 27, is reported at 353 F.2d 648.

[1] The District Court opinion is in the Record printed below, 9 copies of which have been filed under Rule 21(4).

Jurisdiction

The judgment of the Court of Appeals was entered December 3, 1965. Petition for rehearing was denied January 4, 1966. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

I.

Whether petitioner, an experienced and capable Negro public school teacher in Mississippi whose husband is a prominent civil rights leader, was deprived of rights protected by the due process and equal protection clauses of the Fourteenth Amendment when she was denied reemployment without a hearing, without any statement of the grounds for the denial, and on the asserted ground that her husband was a defendant in civil and criminal litigation initiated by state officials (and in which he subsequently prevailed in this Court), although there was no showing that petitioner was in any way responsible for her husband's alleged acts or that they impaired petitioner's fitness as a teacher?

II.

Whether petitioner was denied reemployment on the basis of her civil rights affiliations and those of her husband in violation of her rights under the due process and equal protection clauses of the Fourteenth Amendment, where she presented substantial evidence establishing this claim (including the use of an affidavit statute invalidated in *Shelton* v. *Tucker,* 364 U.S. 479), and the defendants' general denials included no showing of any reason for the denial of reemployment which has a rational bearing on her fitness as a teacher?

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States. The statutory provisions involved are §§6282-41 to 6282-45, Miss. Code Annot. 1942. They are printed in Appendix A, *infra*, pp. 23-26.

Statement of the Case

Petitioner, Mrs. Noelle Henry, was one of the best teachers in the Coahoma County school system (R. 109), and the only teacher with acknowledged connections with a civil rights group (R. 114, 129). The School Board was aware of this through affidavits she submitted listing her NAACP membership (R. 74-75),[2] and because it was common knowledge that her husband, Dr. Aaron Henry, is State President of the National Association for the Advancement of Colored People (NAACP) (R. 72, 133).

Petitioner taught for eleven years in Coahoma County schools (R. 53).[3] Teaching classes with from 50 to 71 pupils, she was highly regarded by her principal and her supervisor (R. 91-92, 98) who, in April 1962, recommended that she be rehired for the 1962-63 school year (R. 60, 98) in her $3,450 position as third grade teacher in the all-Negro McCloud School (R. 54-55). But, although other teachers recommended by principals and supervisors have invariably been rehired (R. 71, 103), the Superintendent announced she would not be offered a new contract (R. 99-

[2] The Board's affidavit requirement complies with a state statute §§6282-41 to 6282-45 Miss. Code Annot. (1942), enacted in 1956, requiring as a condition precedent to employment the annual filing of an affidavit listing without limitation every organization to which the teaching applicant belonged or regularly contributed within the preceding five years.

[3] Prior to this she taught for 5 years in Jackson, Mississippi (R. 53).

100). The same year petitioner was discharged, three unrecommended teachers from her school were rehired and assigned to different schools (R. 88).

Seeking an explanation, petitioner made three separate inquiries to the Board and Superintendent (R. 61-62, 65-66, 67-69). Efforts to secure a hearing before the Board failed (R. 66, 69). Petitioner testified that the Superintendent denied knowing why she was not rehired, and told her:

> Your contract just wasn't renewed for 1962-63, and he said I don't know why the board didn't renew your contract; in going over the contracts when they got to your name they said we don't choose to renew this one. They didn't tell me why and I don't know why (R. 62).

But, the Superintendent testified the Board followed his recommendation (R. 141), denying that it was based on petitioner's NAACP membership and activities (R. 140, 162), although on three previous occasions school officials expressed concern about approving her contract because of her civil rights connections (R. 111-12, 112-13, 118). Rather, he asserted (for the first time during the trial)[4] that he acted on a newspaper report that petitioner's husband was convicted of a misdemeanor involving "morals" (R. 144), and later advice that petitioner's husband was sued for libel by the Prosecutor and Chief of Police who, Henry charged, "framed" him, retaliating for his civil rights activities (R. 147).[5] Finally, the Superintendent said he was told that petitioner and her husband "would be"

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[4] Neither the Answer to the Complaint nor the answers to interrogatories mentioned any of the grounds subsequently given for petitioner's discharge (R. 12-16, 30-33).

[5] The opinion below mistakenly states that Mrs. Henry was not reemployed because of an "adverse judgment" in the libel case (353 F.2d at 649). But, Mrs. Henry was notified that she would not be re-

sued by the plaintiffs in the libel suit to undo an alleged fraudulent conveyance of property (R. 142). He testified that the "activities" of petitioner and her husband were "highly controversial" and that all this litigation would be "a bad influence on children and other teachers" (R. 141-42).

The Superintendent conceded he made no investigation concerning the conviction. He did not know there was no jury trial in the Justice of the Peace Court, or that there was one in the County Court (R. 144-47). He acted before the Mississippi Supreme Court reversed the guilty verdict on June 3, 1963, and although that Court later withdrew this decision and affirmed on July 12, 1963, the Superintendent took no action during the interim to reinstate petitioner (R. 149).[6] Asked whether he made any investigation into the basis for the libel charge, the Superintendent asserted: "It is not my position to dig into lawsuits. My position doesn't entitle me to that time" (R. 164).[7]

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employed on June 4, 1962 (R. 60). The libel trials were held in July 1962 (*Henry* v. *Pearson*, 158 So.2d 695, 698).

[6] The first opinion of the Supreme Court of Mississippi reversing the guilty verdict was originally reported as *Henry* v. *State of Mississippi*, 154 So.2d 289 (1963). Following a Suggestion of Error submitted by the Attorney General of Mississippi, the first opinion and judgment were withdrawn, and a second opinion affirming the judgment of the trial court is now reported at 154 So.2d 289. On certiorari to this Court the conviction was vacated because based on illegally obtained evidence and remanded for a determination as to whether counsel had intentionally waived the right to object to such evidence. *Henry* v. *Mississippi*, 379 U.S. 443 (1965). To date, no action to obtain such a determination has been taken by the state courts.

[7] The libel suits filed against petitioner's husband by the Clarksdale Chief of Police, Benford Collins, and the Coahoma County Attorney Thomas H. Pearson resulted in judgments against petitioner for $40,000. These were affirmed by the Mississippi Supreme Court. *Henry* v. *Collins*, 158 So.2d 28 (1963); *Henry* v. *Pearson*, 158 So.2d 695 (1963), but were reversed by this Court. *Henry* v. *Collins*, 380 U.S. 356 (1965).

Petitioner filed this suit against the Board and Superintendent in October 1962 in the United States District Court for the Northern District of Mississippi. Federal jurisdiction and the claim for injunctive relief were founded on 28 U.S.C. §1343(3) and 42 U.S.C. §1983. Having failed to obtain any information on the basis for her dismissal from the Board or its Superintendent, she alleged the discharge was caused by her NAACP membership and her husband's civil rights activity (R. 2, 7). The trial court sustained all objections (R. 164-65, 167-72) to questions aimed at ascertaining whether growing civil rights activity in the State influenced the decision to replace petitioner (R. 151-52). Nevertheless, in dismissing the complaint it ruled that petitioner failed to sustain her burden of proving that she was discharged for NAACP membership, associations and activities (R. 204).

Following the Superintendent's assertion at trial that he refused to rehire petitioner because her husband was in litigation, petitioner's counsel, pursuant to Rule 15(b) Federal Rules of Civil Procedure, moved to amend the complaint to conform to this evidence, asserting in the proposed amendment that these reasons were as unconstitutional as those alleged originally (R. 193-97). Denying petitioner's motion to amend, the trial court nevertheless wrote that the Superintendent was not arbitrary but "had good cause and exercised a sound discretion" (R. 202-04), in dismissing petitioner if, in his opinion, her husband became notorious in the community. The court agreed that petitioner was "tarred with the same brush" by reason of her marriage and might eventually become personally and unfavorably involved (R. 203). Because she was not rehired, the trial court deemed petitioner a "non-teacher" lacking standing to question the validity of statutes requiring the filing of membership affidavits (R. 207).

The Fifth Circuit affirmed *per curiam* and adcpted the trial court's opinion. Judge Brown, concurring, emphasized that the broad discretion of school officials in hiring teachers cannot be used to interfere with, or discourage the exercise of, federally secured civil rights. A teacher's husband's criminal record and involvement in litigation, according to Judge Brown, "in many cases may justify a refusal to recommend her for this sensitive employment . . ." (App. p. 31). However, if such record and involvement spring solely from attempts to exercise civil rights, such circumstances would not justify a refusal to recommend. In Judge Brown's view, petitioner failed to prove that the Superintendent's refusal to recommend her was based on her civil rights activities or her husband's, or that his involvement in criminal and civil litigation arose from constitutionally protected assertions of civil rights.

On rehearing, petitioner pointed out that the trial court would not permit her to show that the Superintendent knew that community sentiment opposed school desegregation or that civil rights leaders like petitioner's husband frequently are charged with violating criminal laws, but that such prosecutions, while designed to deter civil rights activity seldom, if ever, expressly charge violation of segregation laws; rather, they run the gamut of other criminal statutes.

The Fifth Circuit denied petitioner's petition for rehearing on January 4, 1966.

Reasons for Granting the Writ

Introduction

This case presents questions of substantial public importance, involving a claim of arbitrary and discriminatory denial of public employment contrary to principles declared by this Court. It involves a Negro school teacher denied reemployment in the context of the struggle for public school desegregation in Mississippi. The problems of Negro teachers displaced by discrimination during the desegregation process[8] or discharged in reprisal for their opposition to segregation[9] are matters of national concern. This Court has seen fit to closely scrutinize cases touching on the rights of Negro teachers in relation to school desegregation. *Shelton* v. *Tucker,* 364 U.S. 479; *Bryan* v. *Austin,* 354 U.S. 933; *Bradley* v. *School Board,* 382 U.S. 103; *Rogers* v. *Paul,* 382 U.S. 198. As Mr. Justice Harlan wrote dissenting in *Shelton* (364 U.S. at 496-97), "protection [of constitutional rights] in the context of the racial situation in various parts of the country demands the unremitting vigilance of the courts."

The case involves issues similar to those decided by this Court in a variety of other cases involving First Amendment claims of teachers and, we submit, a conflict with the

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[8] The National Education Association has sponsored a detailed study of the problem. See "Report of Task Force Appointed to Study the Problem of Displaced School Personnel Related to School Desegregation and the Employment Studies of Recently Prepared Negro College Graduates Certified to Teach in 17 States", December, 1965. See also, Ozmon, "The Plight of the Negro Teacher", The American School Board Journal, pp. 13-14, September, 1965.

[9] See *Bryan* v. *Austin,* 354 U.S. 933, vacating 148 F. Supp. 563 (E.D. S.C. 1957); *Shelton* v. *Tucker,* 364 U.S. 479; *Ludley* v. *Board of Supervisors of L.S.U.,* 150 F. Supp. 900 (E.D. La. 1957), *aff'd* 252 F.2d 372 (5th Cir. 1958), *cert. den.,* 358 U.S. 819.

principles decided in those cases. *Wieman* v. *Updegraff*, 344 U.S. 183; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551.

Recently the Court granted certiorari in a case involving the right of a school board to dismiss a teacher in retaliation for the exercise of asserted First Amendment rights, but vacated the judgment when the cause was affected by supervening legislation. See *Watts* v. *Seward School Board*, 381 U.S. 126, where school teachers were dismissed for "immorality" consisting of their having urged the ouster of the Superintendent and the Board. This Court vacated and remanded for reconsideration in light of new legislation barring school boards from interpreting "immorality" to restrict the right to criticize school officials.

I.

The Denial of Reemployment to Petitioner Was Arbitrary and in Violation of Her Rights under the Fourteenth Amendment.

Petitioner has contended that the school authorities merely used her husband's difficulties to screen the real reason for her dismissal, which was to combat NAACP sponsored school desegregation efforts. But assuming *arguendo* that the Superintendent's stated reasons were the basis for petitioner's dismissal, we submit that the stated grounds were arbitrary and unreasonable in violation of her Fourteenth Amendment rights.

This Court clearly has held that a state may not exclude a person from public employment for reasons which are "patently arbitrary or discriminatory." *Wieman* v. *Upde-*

graff, 344 U.S. 183, 192; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 288; *Torcaso* v. *Watkins*, 367 U.S. 488, 495-96; *Baggett* v. *Bullitt*, 377 U.S. 360; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551.

We submit that the actions of the Coahoma County school officials in denying Mrs. Henry reemployment were indeed patently arbitrary and unfair. Before detailing this, it ought to be noted that while in a formal sense the action of the authorities was to refuse to rehire petitioner, this action, placed in its context, is tantamount to dismissing her from her job. She had held her job eleven years, and her principal and supervisor recommended that her employment be continued. Such recommendations were invariably followed and thus reemployment was more or less automatic or routine until petitioner's case. See Judge Parker's dissent in *Bryan* v. *Austin*, 148 F. Supp. 563, 572-73 (E.D. S.C. 1957), *vacated*, 354 U.S. 933. But the school officials' action violated the Fourteenth Amendment whether it is viewed as a job dismissal or as a rejection of an application for public employment. In neither context can the State impose unconstitutional conditions upon the opportunity to hold public employment. Cf. *Alston* v. *School Board of the City of Norfolk*, 112 F.2d 992, 997 (4th Cir. 1940), *cert. den.* 311 U.S. 693; *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. 583, 594; *Speiser* v. *Randall*, 357 U.S. 513; *Sherbert* v. *Verner*, 374 U.S. 398.

Mrs. Henry was denied reemployment without any notice of the charges against her. Her repeated attempts to learn the ground for the action were unavailing. Consequently, she had no opportunity to explain or refute the charges against her, and no opportunity to attempt to show that the accusations were untrue or had no bearing on her fitness. Her requests for a hearing were denied. The

Superintendent informed himself of the facts solely by newspaper accounts (R. 144), and conversations with the lawyer representing Mr. Henry's adversaries in a libel suit (R. 144, 147).

The denial of notice of the charges and a hearing when petitioner was denied reemployment violate fundamental conceptions of fairness. This is not a case where a teacher was denied reemployment because of dissatisfaction with her job performance. The entitlement to a hearing in such a case might involve different issues. But the action to deny Mrs. Henry's job was taken because the Superintendent thought petitioner and her husband were engaged in "highly controversial" activities (R. 141). Such a charge is so plainly susceptible of use to hide forbidden purposes that the minimal protection of notice and a hearing is compellingly necessary.

As this Court pointed out in *Greene* v. *McElroy*, 360 U.S. 474, 496-99, the right to notice and a hearing is fundamental in certain administrative and regulatory actions as well as in criminal cases. In *Greene* the Court said (360 U.S. at 496):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the only reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

In another context, in *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551, the Court condemned the summary dismissal of a teacher without hearing under a statute providing for the discharge with-

out notice or hearing of any city employee utilizing the privilege against self-incrimination. See *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961), *cert. den.* 368 U.S. 930, and *Knight* v. *State Board of Education,* 200 F. Supp. 174 (M.D. Tenn. 1961), both holding that students in state schools had a due process right to hearings before expulsion.

When the Superintendent finally (midway through the trial of this case) stated why he did not rehire petitioner, he gave reasons which, we submit, demonstrate that the action was arbitrary and unfair. The reasons were that petitioner's husband had been convicted of a morals charge and had been sued for libel by the Chief of Police and County Attorney, and that the Superintendent was told that a suit "would be instigated for setting aside property to Noelle Henry by her husband to avoid payment on the libel charge" (R. 142). Thus petitioner was denied reemployment because of a criminal charge and a civil suit against her husband and because a lawyer threatened to file a further civil suit involving her property. There was no claim or showing that Mrs. Henry was in any way culpable or did any blameworthy act in connection with any of those cases. There was no claim that she knew of or could have prevented any of the alleged acts by her husband. It is quite plain that the denial of reemployment punished petitioner for the alleged acts of someone else which she had no power to control or prevent.

We submit that it is fundamentally unfair and a denial of due process to punish petitioner for the alleged acts of another. There is no claim that her husband's troubles actually impaired petitioner's performance of her job as a third grade teacher. Her supervisors recommended that she be reemployed and had nothing but praise for her work. We submit that it is not permissible to make an

automatic inference or presumption that petitioner was unfit to teach because her husband was a party to civil litigation and was convicted of a crime. This presumption is no more permissible than was New York's presumption that a teacher who relied on the privilege against self-incrimination was unfit to teach. *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551.

The presumption that petitioner was unfit because her husband was convicted, and had been sued for damages, and because it was said that she was going to be sued in the future, is not founded on reason. This punishment of one for the deeds of another partakes of some of the characteristics of Bills of Attainder which carried with them a "'corruption of the blood,' which meant that the attainted party's heirs could not inherit his property" and sometimes "exclusion of the designated party's sons from Parliament." See *United States* v. *Brown*, 381 U.S. 437, 441-42.

The presumption here imputes guilt to the wife from association with her husband. In *Wieman* v. *Updegraff*, 344 U.S. 183, the Court condemned a law which might punish innocent as well as guilty activity. The Coahoma County school officials have simply punished petitioner for innocent activity.

Petitioner would have no assurance that she could rehabilitate herself in the eyes of the school officials even by so drastic a step as separating from her husband and seeking a divorce. But we need not stop long to ponder that because making public employment conditional upon obtaining a divorce is a flagrant invasion of the right of free association in marriage. See *Griswold* v. *Connecticut*, 381 U.S. 479; *cf. Meyer* v. *Nebraska*, 262 U.S. 390, 399; *Skinner* v. *Oklahoma*, 316 U.S. 535, 541.

We urge that the principle that public employees can be deprived of their jobs because of the misdemeanors of their spouses is totally alien to conceptions of fairness embodied in our law. The principle that public employees can be fired because private litigants sue their relatives for damages is even worse. The principle that public employees can be fired because someone merely threatens to sue them is preposterous. However sensitive a teacher's job—and sensitive it is—there is no justification for conditioning their employment on events which they can never control and which have no necessary relation to their fitness.

The injustice of punishing Mrs. Henry because of the alleged misdeeds of her husband is compounded by the ironical result that while Mrs. Henry has now been punished for four years, Dr. Henry was saved from criminal punishment or from paying damages by the due process clause of the Fourteenth Amendment. His criminal conviction was vacated by this Court in *Henry* v. *Mississippi*, 379 U.S. 443, and no further action has been taken since the case was remanded to the trial court. The libel judgments against him were also reversed by this Court in *Henry* v. *Collins*, 380 U.S. 356, and that result mooted the dispute over an alleged fraudulent conveyance.

The view that Mrs. Henry was "tarred with the same brush" by reason of her marriage (R. 203) was thought by the courts below to be sufficient to dispose of the matter. The opinion below did not see fit to mention that all of the judgments against Dr. Henry had been set aside by this Court. Thus petitioner was tarred by the brush of the accusations but denied the benefit of her husband's vindication.

The trial court recognized that this case involves the doctrine of guilt by association and its opinion quotes and

relies upon language in *Adler* v. *Board of Education,* 342 U.S. 485, which is asserted to sanction that doctrine (R. 203-204). Whatever may be the permissible reach of that doctrine where knowing and sympathetic association with subversive groups is involved, surely the permissible scope of its application must be narrowly circumscribed where the association is one of marriage or kinship and has no connection with the alleged antisocial conduct.[10]

II.

Petitioner Was Discharged in Violation of Her Fourteenth Amendment Rights Because of Her Own Civil Rights Involvement and Her Husband's.

The lower courts found petitioner failed to prove "by a preponderance of the evidence" that the School Board refused to rehire her because of her civil rights affiliations and those of her husband. But these findings are contrary to the record. The issue involves the proper inferences to be drawn from known facts which are determinative of constitutional rights. This Court has traditionally exercised its power to scrutinize the record and make its own independent examination of the facts determinative of constitutional claims. *Napue* v. *Illinois,* 360 U.S. 264, 271-72, and cases collected in Note 4; *Watts* v. *Indiana,* 338 U.S. 49, 50-51; *Norris* v. *Alabama,* 294 U.S. 587, 589-90; *Niemotko* v. *Maryland,* 340 U.S. 268, 271; *Pierre* v. *Louisiana,* 306 U.S. 354, 358.

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[10] See Brown, *Loyalty and Security,* Yale Univ. Press (1958), which summarizes public resentment to "guilt by relationship" and "guilt by marriage and kinship" cases when they came to public attention in 1955. Such cases are reported in *Government Security and Loyalty,* 31:501-502, GSL Newsletter, Bureau of National Affairs (BNA), Oct. 1955.

Petitioner was an effective teacher (R. 91-92, 98) who, despite long experience and continuing favorable supervisors' recommendations (R. 92, 103), had nearly been refused a teaching contract during 1955, 1956 and 1961, because of her NAACP affiliation (R. 73, 111-12; 112-13; 118, 133). Petitioner was the only one of 200 teachers (R. 129) in the system (all assigned to schools on a segregated baisis, R. 130) who professed NAACP membership (R. 113-14), and the only one whose spouse was active in civil rights efforts (R. 133). The Board replaced petitioner with a teacher without teaching experience (R. 151-52).

The Board obtained its first official knowledge of petitioner's NAACP membership (R. 113) through a teacher affidavit statute enacted by the Mississippi Legislature in 1956, §§6282-41 to 6282-45, Miss. Code Annot. 1942 virtually identical to Arkansas's provision invalidated in *Shelton* v. *Tucker*, 364 U.S. 479 (1960). The law requires all teaching personnel to submit annually as a condition precedent to employment, an affidavit listing every organization to which the applicant belonged or regularly contributed within the preceding five years. Such a provision, as this Court held in *Shelton* v. *Tucker, supra,* must be considered against the system of employment in which teachers are hired on a year to year basis, without job security beyond the end of each school year (R. 201, 205). The dangers of the Mississippi law are greater than those of Arkansas because Mississippi has continued to enforce its statute after *Shelton* v. *Tucker, supra.*[11]

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[11] Even the dissenters in *Shelton* indicated their opposition was limited to the statute's validity on its face and that proof of abuses in the Act's administration would make a different case, 364 U.S. 499. In Mississippi, state statutes and the Board's continuing policy of segregation raise a strong presumption of such abuses.

Because of her NAACP listing, the former Superintendent wanted to refuse petitioner's application for a contract or to subject it to termination on two weeks notice (R. 112-13) but was persuaded to change his mind. The present Superintendent, upon reviewing the membership affidavits in 1960 was shocked by petitioner's NAACP entry and had to be persuaded to offer her a contract for the 1960-61 school year (R. 118).[12]

When in 1962 the Superintendent overruled recommendations by her principal and supervisor that petitioner be rehired, it upset a long-established practice of honoring such recommendations (R. 103), but accommodated a phalanx of Mississippi statutes requiring public school segregation[13] and that public officials resist by all legal means, the implementation of this Court's desegregation decisions.[14] The Coahoma County schools were operated on a completely segregated basis when petitioner was dis-

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[12] Petitioner's effort to challenge the Mississippi affidavit statute were frustrated by the lower court's ruling that at the time suit was filed she had not been rehired and was a "non-teacher" (R. 207). This ruling failed to consider that all persons to whom the membership affidavit requirement could possibly apply are "non-teachers" since they are mere applicants for teaching contracts at the point where the affidavit must be completed. The Mississippi statute provides, as did the Arkansas provision, that: "No . . . teacher shall be employed . . ., until, as a condition precedent to such employment, such . . ., teacher shall have filed . . . an affidavit. . . ." Compare §6282-41 Miss. Code Annot. 1942 (p. 23, *infra*), with Act 10 of the 2nd Ex. Sess. of Arkansas General Ass. of 1958, *Shelton* v. *Tucker*, 364 U.S. 479, 480, n. 1 (1960). Moreover, petitioner is clearly in the class affected by this legislation and may challenge the imposition of this unconstitutional burden upon her without refusing to sign an affidavit in order to make a test case. *Evers* v. *Dwyer*, 358 U.S. 202 (1958). See also, *Alston* v. *School Board of City of Norfolk*, 112 F.2d 992, 996-97 (4th Cir. 1940); *Bryan* v. *Austin*, 148 F. Supp. 563, 572 (E.D. S.C. 1957) (dissent by Judge Parker), *vacated*, 354 U.S. 933.

[13] Section 4065.3 Miss. Code of 1942 Annot., see also Article 8, §207, Miss. Const.; §§2056, 3841.3, 6220.5, 6328-03 and 9028-31-48 Miss. Code of 1942 Annot.

[14] §4065.3 Miss. Code of 1942 Annot, requires the entire executive branch of the Government, including "all boards of county superintendents of education . . . to prohibit, by any lawful, peaceful and consti-

missed (R. 130), and the system remained totally segregated until January 1966, when two Negro pupils were admitted to a white school under a plan submitted to the U. S. Office of Education under the Civil Rights Act of 1964.

Petitioner submits that these facts establish a *prima facie* case of discrimination because of her NAACP activities and associations, and the burden shifted to the school authorities to produce evidence sufficient to combat the clear inference. Nor could such inferences be overcome by the Superintendent's mere assertions that petitioner's civil rights connections played no part in her dismissal (R. 140) where no reasonable alternative ground for dismissal having a rational relation to her fitness was put forth. Cf. *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958); *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Avery* v. *Georgia,* 345 U.S. 559 (1953); *Norris* v. *Alabama,* 294 U.S. 587 (1935).

The Superintendent claimed that after learning from a newspaper article about petitioner's husband's difficulties in March, 1962 (R. 144), he refused to follow the favorable recommendations of her principal and supervisor. Yet, in May 1962, he gave no reason to the Supervisor of Negro Schools why the Board had not renewed her contract (R. 99). Then, in June, 1962, he told petitioner that it was not he, but the Board who had refused her application, and he did not know why they had so acted (R. 62). Finally, in September, 1962, in answer to petitioner's re-

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tutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court, . . . [citations omitted] and to prohibit by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools. . . ."

quest for a hearing or at least some explanation, the Superintendent replied, orally and by letter, that no reasons had to be given and that the action of the Board was final (R. 68-69). The reasons for discharge were not mentioned in the defensive pleadings or answers to interrogatories. Nothing, except the Superintendent's bare assertion, contradicts the proposition that the stated reasons for denying reemployment were after-the-fact rationalizations for the action.

The Superintendent made no investigation of the status of the criminal charge or the libel suit against petitioner's husband (R. 144, 164). He made no investigation of the rumored fraudulent conveyance (R. 147). Even the Supreme Court of Mississippi's reversal of petitioner's husband's conviction, albeit temporary, had no effect in his decision (R. 148-49).

The Superintendent claimed his action was based on concern for the welfare of Negro children (R. 141-42) and reported that, after receiving complaints from the Negro supervisor and the Negro community, a Negro principal was dismissed because of his wife's alleged "immoral" conduct (R. 161). The Superintendent gave no details of that episode. But there is no record of any complaints by anyone against petitioner. She was informed by her principal that she would be recommended for the 1962-63 school year on March 21, 1962 (R. 60). Her principal made no mention of petitioner's husband's arrest of March 3, 1962, or his conviction in the Justice of the Peace Court on March 14, 1962. Obviously, the principal had no doubts about the irrelevance of her husband's difficulties to petitioner's worth as a third grade teacher. The high esteem in which petitioner's principal, supervisor and the Negro community continue to hold her demonstrates that the Superintendent's fears, upon which the dismissal was purportedly based, were unfounded.

Respondent's conduct must be evaluated in the light of its continued use of an affidavit requirement which this Court held a serious impairment of the teacher's right of free association, *Shelton* v. *Tucker*, 364 U.S. 479, 486, and Mississippi statutes and policies requiring the Board to maintain racial segregation. *Meredith* v. *Fair*, 305 F.2d 343 (5th Cir. 1962), *cert. den.*, 371 U.S. 828; *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963); *Evers* v. *Jackson Municipal Separate School District*, 328 F.2d 408 (5th Cir. 1964).

In *Meredith* v. *Fair*, 305 F.2d 343, 360 (5th Cir. 1962), *cert. den.*, 371 U.S. 828, the Court set standards of review: "to study the case as a whole, weighing all of the evidence and rational inferences in order to reach a net result; . . ." and "to consider the immediate facts in the light of the institution's past and present policy on segregation, as reflected not only in the evidence but in statutes and regulations, history and common knowledge; . . ." Notwithstanding the State's strenuous assertions that Meredith's application was denied because of (a) an alleged false voter registration, (b) psychological problems, and (c) a bad character risk, the court, rejected the State's reasons as "frivolous" and "trivial". The Court concluded he was rejected because of his race. 305 F.2d at 361. Compare *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *Robinson* v. *Florida*, 378 U.S. 153 (1964).

Similar standards should be applied here. The lower court's conclusion that "There are no racial or civil rights overtones in this record . . ." (R. 205) flies in the face of what the court has frequently judicially noticed about Mississippi's racial policy under the truism "what everybody knows the court must know." *Meredith* v. *Fair*, *supra* at 344-45. By its failure to take notice of this policy,

and refusal to hear evidence about it, the lower court condemned this case to "the eerie atmosphere of never-never land," *Meredith* v. *Fair,* 298 F.2d 696, 701 (5th Cir. 1962). This case should be recognized for what it is—a punishment of Mrs. Henry for her civil rights views and her husband's. Nothing else reasonably accounts for the fact than an admittedly experienced and capable teacher has been deprived of an opportunity to work in her profession for four years. We urge the Court to pierce the veil which disguises this discrimination as was done in such cases as *Garner* v. *Louisiana,* 370 U.S. 248; *NAACP* v. *Button,* 371 U.S. 415, 445 (Justice Douglas concurring); and *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 99 (Justice Fortas and the Chief Justice, concurring).

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Miss. Code Annot. 1942 (Cum. Supp. 1960)

§ 6282–41. Superintendents, principals, and teachers to file affidavit as to membership in organizations.

No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the trustees of the district operating such school, and no instructor, professor or other teacher shall be employed or elected in any junior college or institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor, professor, or other teacher shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations of which such superintendent, principal, teacher, instructor, professor, or other teacher is, or within the past five (5) years, has been a member, or to which organization such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five (5) years has paid, regular dues or to which the same is making, or within the past five (5) years, has made regular contributions.

§ 6282–42. Form of affidavit.

Such affidavit may be in substantially the following form:

STATE OF .....
COUNTY OF .....

I, ... (name of affiant), being an applicant for the position of ..... at ..... (name of school

or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past 5 years a member of the following organizations and no others:

.....

.....

(names and addresses of organizations)

and further, that I am now paying, or within the past five (5) years have paid, regular dues or made regular contributions to the following organizations and no others:

.....

.....

(names and addresses of organizations)

.....

(Signature of Affiant)

.....

Affiant

Sworn to and subscribed before me, this the ..... (date) day of ..... (month), 19..... (year).

.....

(Signature of Official)

.....

Title of Official

Appendix A

§ 6282–43. Contracts of employment void for failure to file affidavit.

Any contract entered into by any board of trustees of any school district, junior college, institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in section 1 [§ 6282–41] hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendants therein and upon the official bonds made by such defendants, if any such bonds be in existence.

§ 6282–44. Penalty for filing false affidavit.

Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished as provided by law, and in addition, shall forfeit his license to teach in any of the schools, junior colleges, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this state.

Appendix A

§ 6282–45. Constitutionality.

If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act; nothing herein contained, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21438

NOELLE M. HENRY,

Appellant,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

(December 3, 1965.)

Before:

HUTCHESON and BROWN, *Circuit Judges,*
and MORGAN, *District Judge.*

Per Curiam:

This is an appeal from a judgment of the United States District Court for the Northern District of Mississippi, denying plaintiff the relief she sought in her suit to require by injunction that she be re-employed as a teacher in the Public School System of Coahoma County, Mississippi.

Appellant, Mrs. Henry, is a negro school teacher who has taught in the same school for eleven years. In Missis-

sippi teachers have no tenure but are hired on one year contracts which are reviewed for renewal each year. The usual or ordinary, indeed the required, procedure is that the teacher's principal or supervisor make his recommendation for renewal to the County School Superintendent, and the superintendent in turn makes his recommendation to the School Board. It is statutory in Mississippi[1] that the School Board cannot hire anyone not recommended by the County Superintendent. It is also required by statute that all teacher applicants list all organizations to which they do belong or have belonged or to which they have contributed money for the past five years. Mrs. Henry was, and is, a member of the National Association for the Advancement of Colored People and also the only teacher to so state on her application. Although she was recommended by her supervisors to Hunter, the County Superintendent, Hunter did not recommend her, and her contract was not renewed for the 1962-1963 school year.

Mrs. Henry testified that she made three separate attempts to obtain an explanation from Hunter or the School Board as to the basis of the refusal to renew her contract, but each time Hunter told her the Board had made the refusal and had given him no reason therefor and that further discussion of the matter would be useless. She filed suit, stating as the basis for her complaint that the Board had refused to renew her contract because she was a member of the National Association for the Advancement of Colored People and because her husband was and is President of that Association in Mississippi. Relief prayed for was that the Board be enjoined from refusing to renew her contract for 1962-1963 and that the

[1] See Lott v. State, 121 So.2d. 402.

statute requiring teacher applicants to list their organizational activities be declared unconstitutional.

At the trial Hunter testified that the Board had not renewed the contract because he had not recommended Mrs. Henry. When questioned by the court, he stated that his refusal to recommend her was based on the fact that her husband had been convicted on a morals charge and had suffered an adverse judgment in a libel suit, and that he had reliable information that suit was about to be filed against Mrs. Henry in respect of a fraudulent conveyance made to her by her husband. Hunter expressly testified that his decision was not due to Mrs. Henry's or her husband's civil rights activities or any N.A.A.C.P. affiliations.

At the conclusion of the hearing the Court ordered a time for filing memorandum briefs. During this time Mrs. Henry moved to amend her complaint under Rule 15(b) to conform to the reasons given by Hunter as a basis for his refusal to recommend her. The district judge refused to allow the amendment on the basis that it would change the entire character of the case. Also he pointed out that the evidence which formed the basis for the motion was elicited by questions from the court and that it came in over the objection of the plaintiff; that with notice this point could be much more fully developed since neither side had come prepared on this issue, and to allow the amendment at that late date would be to do so without such development. However, the judge stated that in the event of appeal, in order that the appellate court might have the benefit of the lower court's views in this aspect of the case, he had dealt with the case as if the motion to amend had been granted.

Judgment was entered, refusing to enjoin the Board on the basis that Mrs. Henry had failed to sustain her burden

of proof that the refusal to renew her contract was due to her civil rights activities. On the contrary, the finding was that the Board was without authority to renew the contract due to Hunter's failure to recommend Mrs. Henry, and thus was not properly a party to the suit. Further the court found that the reasons to which Hunter testified constituted good cause and that he exercised sound discretion in not recommending Mrs. Henry for re-employment. The court refused to rule on the constitutionality of the statutory requirement that teachers list their organizational activities, stating that: "Inasmuch as plaintiff in her present status as a non-teacher is not affected by this requirement, this issue is now moot".

The district judge filed a full opinion,[2] stating the facts and issues and the reasons and grounds for his findings, decision and judgment.

We agree with his decision and judgment and adopt his opinion as our own, and, because we do, it will be unnecessary for us to repeat or discuss further his findings and conclusions. It will be sufficient to say that we approve and adopt his opinion and the findings and conclusions stated in it and order the judgment AFFIRMED.

BROWN, Circuit Judge, Concurring.

In joining in the affirmance, I would emphasize two things about the Court's decision. First, though the Superintendent may have broad discretion in recommending or refusing to recommend a teacher for employment by the Board, the Court recognizes that this discretion does not prevent judicial inquiry into the constitutional propriety of his motives in refusing to recommend Plaintiff. See *Hornsby* v. *Allen*, 5 Cir., 1964, 326 F.2d 605, re-

[2] Henry v. Coahoma County Board of Education, et al., —— F.Supp. ——.

hearing denied, 330 F.2d 55. Discretion gives much power, but this power may never be used to interfere with, or discourage, the exercise of federally guaranteed civil rights including the right to persuade or encourage others in the exercise of their civil rights. *United States* v. *Bruce*, 5 Cir., 1965, —— F.2d —— [No. 22028, Nov. 16, 1965]; see *United States* v. *Board of Educ. of Green County, Miss.*, 5 Cir., 1964, 332 F.2d 40. Second, though a teacher's husband's criminal record and involvement in litigation undoubtedly in many cases may justify a refusal to recommend her for this sensitive employment, if in fact such a record and such involvement spring wholly from attempts by him to exercise these broadly defined civil rights, then under such circumstances these considerations would not justify a refusal to recommend either under the exercise of—or the guise of exercising—such discretion.

The Court affirms because the Plaintiff failed to prove either that the Superintendent's refusal to recommend her was based on the civil rights activity of her or her husband, or that her husband's criminal record, which the Superintendent did consider, arose primarily from constitutionally protected assertions of civil rights.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 21438

D. C. Docket No. 43-62

NOELLE M. HENRY,

Appellant,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before:

HUTCHESON and BROWN, *Circuit Judges,*
and MORGAN, *District Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

Judgment

It is further ordered and adjudged that the appellant, Noelle M. Henry, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 3, 1965

Brown, Circuit Judge, Specially Concurs.

Issued as Mandate: Jan. 12, 1966

On Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21438

NOELLE M. HENRY,

Appellant,

—v.—

COAHOMA COUNTY BOARD OF EDUCATION, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

(January 4, 1966)

Before:

HUTCHESON and BROWN, *Circuit Judges,*
and MORGAN, *District Judge.*

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

U. S. COURT OF APPEALS

FILED

JAN. 4, 1966

EDWARD W. WADSWORTH
CLERK